ORIGINAL

Before the DOCKET FILE COPY ORIGINAL
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief	)	WT Docket No. 97-~~197~~ 97-192
From State and Local Regulations Pursuant to	)	
Section 332(c)(7)(B)(v) of the Communications	)	
Act of 1934	)	

To: The Commission

COMMENTS

BellSouth Corporation ("BellSouth"), on behalf of its subsidiaries and affiliates, hereby submits these comments in response to the above-captioned Notice of Proposed Rulemaking ("*NPRM*") released on August 25, 1997.[1]

BellSouth generally supports the Commission's efforts to adopt clear procedures that allow parties adversely affected by state and local government actions or regulations based on radiofrequency ("RF") emissions to petition the Commission for relief. As discussed below, to the extent personal wireless facilities are in compliance with the Commission's RF guidelines, licensees should be required to meet only the most minimal of state and local government obligations to demonstrate compliance.

I. For Purposes of State and Local Regulation Involving RF Emissions Issues, FCC Licensees May Request Relief From the Commission Based on Any Act or Failure to Act by the State or Local Government Entity.

Section 332(c)(7)(B)(v) permits adversely affected persons to challenge a "final action" or "failure to act" in any court of competent jurisdiction.[2] With respect to seeking Commission

---

1 FCC 97-303, 62 Fed. Reg. 47,960 (1997).

2 47 U.S.C. § 332(c)(7)(B)(v).

relief under Section 332(c)(7)(B)(iv), covering state and local regulation of personal wireless facilities on the basis of RF emissions, subsection (v) states: "[a]ny person adversely affected by *an act* or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief."[3] In the *NPRM*, the Commission requested comment on the definition of "final action" in order to determine when relief can be sought.

While the term "final action" is relevant to seeking court review of actions covered under § 332(c)(7)(B), it is not used in the statute as a prerequisite to seeking relief under clause (iv) at the Commission for persons adversely affected by the regulation of the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of RF emissions. Under § 332(c)(7)(B)(v), FCC relief can be sought for any "act" (or failure to act). It is well established that when Congress uses different language in different sections of a statute, it does so intentionally.[4] Thus, action need not be final before Commission relief is sought. Accordingly, BellSouth agrees that a licensee may seek relief at the Commission for an adverse decision by, for example, a local zoning board while an appeal to a zoning board of appeals is pending.

II. Determinations of a "Failure to Act" Should be Made on a Case-By-Case Basis.

As noted above, a "failure to act" by a state or local government permits adversely affected persons to seek relief in any court of competent jurisdiction or at the Commission in cases involving RF emissions issues. In the *NPRM*, the Commission proposed to determine

---

3 *Id.* (*emphasis added*).

4 *See, e.g., Florida Pub. Telecomm. Ass'n v. FCC*, 54 F.3d 857, 860 (D.C. Cir. 1995).

whether a "failure to act" has occurred on a case-by-case basis, taking into account various factors such as how state and local governments typically process other facility siting requests and other RF-related actions. The Commission also sought comment on the "average" length of time it takes to issue various types of siting permits.

Based on BellSouth's experience, it would be difficult to come up with a representative amount of time that would demonstrate a failure to act. Within even a single state, BellSouth has encountered timeframes for the issuance of permits ranging from a few days to 6 months or more, depending on the degree of controversy involved. Averages, therefore, would not be particularly useful. BellSouth believes that any determination of "failure to act" is most appropriately accomplished by a case-by-case approach.

III. Licensees May Seek Relief at the Commission For State and Local Regulations Partially Based on RF Emissions Issues or Where No Formal Justification is Provided.

BellSouth agrees with the Commission that state and local regulations need not be based entirely on the environmental effects of RF emissions in order for decisions to be reviewed by the Commission. As noted in the *NPRM*, the Conference Report clearly states that Section 332(c)(7)(B)(iv) is intended to prevent state and local governments from basing regulations directly *or indirectly* on the environmental effects of RF radiation. Thus, the local action need not expressly reference RF environmental effects nor be based entirely on such effects, if in fact such action or failure to act or portion thereof is based on the environmental effects of RF radiation.

The Commission must be able to determine on a case-by-case basis whether to preempt local actions any time they are based wholly or partially on RF emissions issues. Any other

conclusion would run contrary to the Congressional intent of Section 332(c)(7)(B)(iv) by permitting state and local governments to avoid preemption yet regulate personal wireless service facilities for RF-based reasons by either not directly referring to such effects or by basing their actions on other reasons.

IV. Licensees Should Not Be Required to Demonstrate to State and Local Governments Compliance with the RF Emissions Rules Beyond What Is Required under the Commission's Rules.

Section 332(c)(7)(B)(iv) forbids state or local governments from regulating the placement, construction, and modification of wireless facilities if such facilities comply with the applicable FCC regulations. The Commission sought comment on two alternative showings that would be permissible for local and state governments to request.

As the Commission is well aware, the recently adopted rules governing RF emissions were the result of an exhaustive and detailed rulemaking proceeding, involving participation by numerous affected parties and other federal agencies with expertise on health and safety issues.[5] Further, the Commission's Office of Engineering and Technology issued a revised Technical Bulletin to assist FCC licensees with compliance.[6] With this intricate regulatory framework, the Commission has ensured that all FCC-regulated transmitters will be operated in such a manner that any possible adverse effects from RF emissions are minimized to the greatest extent possible.

---

[5] *See In the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order*, ET Docket No. 93-62, 11 FCC Rcd 15123 (1996) ("*R&O*"); *Second Memorandum Opinion and Order*, FCC 97-303 (Aug. 25, 1997) ("*Recon. Order*").

[6] *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, OET Bulletin 65, Edition 97-01 (Aug. 1997).

Based on this highly protective set of rules, and the plain language of the statute which permits preemption if facilities comply with the FCC's RF emissions rules, BellSouth supports the Commission's first alternative with its more limited showing. Under the new RF emissions rules, if facilities are categorically excluded, there is very little chance that the exposure limits will be approached.[7] In cases where categorical exclusion does not apply, routine environmental evaluations involving measurements and/or modeling of RF field levels must be performed.[8] Where necessary, various means of controlling exposure such as limiting access must be employed to ensure compliance.[9]

Since FCC licensees must undertake such extensive evaluations of their transmitters, and employ measures to control exposure when required, no additional showings other than those required to demonstrate compliance with the Commission's rules should be necessary for state and local governments. Therefore, if facilities are categorically excluded, a licensee should only need to certify that based on the parameters of Table 1, Section 1.1307(b), no further environmental processing is necessary. If not categorically excluded, licensees should be required to provide no more than copies of any documents which were required to be filed with the Commission to demonstrate compliance.

---

7 *See R&O*, 11 FCC Rcd at 15158; *Recon. Order* at ¶ 45.

8 47 C.F.R. § 1.1307(b).

9 *See R&O*, 11 FCC Rcd. at 15157.

V. The General Provisions Proposed for Reviewing Requests for Relief Should Be Adopted and the Commission Should Limit Who May Formally Participate in Such Proceedings.

BellSouth supports the Commission's proposal which would require that requests for relief be filed in the form of a declaratory ruling and served on the state or local authority responsible for the action or failure to act which is the subject of the dispute. Further, Sections 1.45 through 1.49 of the Commission's rules concerning the filing of pleadings and responsive pleadings should be applicable to such proceedings.

The *NPRM* requested comment on whether participation is such proceedings should be limited to interested persons able to demonstrate standing. Section 332(c)(7)(B)(v) limits those who can seek relief to "any person adversely affected." It would follow that only those parties who would be adversely affected by grant of the requested relief (*i.e.*, preemption of the state or local action) should be permitted to participate formally as parties in the proceeding. Since the petition would be directed at the action or failure to act of the specific state or local government authority responsible for the challenged action, only those governmental entities should be given a formal opportunity to respond.

Actions by State and local governments are taken on behalf of their constituents. These constituents have the opportunity to participate in the formation of local government policies, as well as in proceedings undertaken pursuant to those policies, at the local level. By the time a state or local government decision reaches the Commission in response to a request for federal relief, local government officials alone must take responsibility for defending their action or

modifying their position.[10] Furthermore, allowing formal participation by any person other than the state or local government entity involved would run contrary to the purpose of Section 332(c)(7)(B)(v), which is designed to provide relief for those entities which are adversely affected by state and local government action where such action is preempted, and would only place unnecessary burdens and costs upon the petitioning licensee.

VI. The Rebuttable Presumption of Compliance Proposed in the NPRM Is Appropriate and Should Be Adopted.

BellSouth supports the Commission's proposal to establish a rebuttable presumption that wireless facilities will comply with the RF emissions guidelines, and to require an interested party to bear the initial burden of proof and make a *prima facie* case for noncompliance. This rebuttable presumption should apply regardless of whether FCC rules require the filing of an application for new or modified facilities, because an application and environmental assessment would be required if the facilities would not be in compliance with the RF guidelines. Such an approach is consistent with the reasons cited above for limiting the amount of information that a state or local government can request to demonstrate compliance. FCC licensees are obligated under federal law to ensure that either RF emissions do not exceed the limits or that measures consistent with the guidelines have been taken to sufficiently limit exposure. There is no reason to believe that licensees will not comply with the FCC's requirements, and establishing a rebuttable presumption that they do comply is entirely appropriate.

---

[10] *See Manson v. Stacescu*, 11 F.3d 1127 (2d Cir. 1993); *see also United States v. Lamar Life Ins. Co.*, 578 F.2d 144 (5th Cir. 1978).

CONCLUSION

BellSouth urges the adoption of rules consistent with its comments above in order to ensure that state and local governmental regulation of personal wireless facilities based on RF issues is preempted to the extent that licensees are in compliance with the Commission's rules.

Respectfully submitted,

BELLSOUTH CORPORATION

By: Jim O. Llewellyn jdc

William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, NE, Suite 1800
Atlanta, GA 30309-2641
(404) 249-4445

By: David G. Frolio jdc

David G. Frolio
1133 21st Street, N.W.
Washington, DC 20036
(202) 463-4182

Its Attorneys

October 9, 1997